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The Emperor's New Scanner: Muslim Women at the Intersection of the First Amendment and Full-Body Scanners

*Rohen Peterson**

I. INTRODUCTION

The image of Muslim women has been used as both a symbol of a victimized populace and as a symbol of hope. Much of this rhetoric has surrounded the importance of what most in Western countries refer to as “the veil.”¹ However, this stereotypical concept of the veiled Muslim² woman belies the individual women themselves.

In a country such as the United States, where the ideals of fairness and equality for all are prominent, Muslim women seem to represent an old world concept that does not incorporate the rights or equality of women. A prevalent notion in the United States is that Islam subjugates women, barring them from liberties to which they are entitled.³ As a result, some Muslim women in the United States are often scorned because the clothes they wear seem to represent repression and male domination.

However, some journalists and scholars have begun to argue in support of Muslim women freely expressing their beliefs.⁴ Some of this work is a backlash against increasing secular and anti-Islamic sentiments, stemming

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1. See Cathy Young, *Are Muslim Women Oppressed?*, REASON MAGAZINE (Oct. 24, 2006), <http://reason.com/archives/2006/10/24/are-muslim-women-oppressed>.

2. This Note uses “Muslim” to indicate a follower of Islam. “Islamic” is used to refer to the faith and the culture of Islam.

3. See *What Factors Determine the Changing Roles of Women in the Middle East and Islamic Societies?*, PBS GLOBAL CONNECTIONS (2002), <http://www.pbs.org/wgbh/globalconnections/mideast/questions/women/>. See also Lisa Beyer, *The Women of Islam*, TIME (Nov. 25, 2001), <http://www.time.com/time/world/article/0,8599,185647,00.html>.

4. See Lorraine Ali, *Behind the Veil*, N.Y. TIMES (Jun. 11, 2010), <https://www.nytimes.com/2010/06/13/fashion/13veil.html>.

from an influx of Muslim immigrants into Western countries.⁵ These writers address traditional Islamic clothing as a manifestation of a personal expression in lifestyle and religion rather than an oppressive culture that stifles expression.⁶

Self-expression, and particularly the expression of religious beliefs, is protected by the First Amendment.⁷ Freedom of religion is a core construct of society in the United States, enshrined in the Bill of Rights.⁸ This protection guarantees that religious beliefs and the right to express them cannot be sacrificed for mere expedience or convenience at the whim of the state.⁹

In the context of airport security after the attacks of September 11, 2001, Islam has taken a new image for many people. Those who appear to be Muslim are often associated with terrorism or danger.¹⁰ The result has often been profiling, while at other times it is overt stares or not-so-subtle whispers.¹¹ Because of their Muslim identity, Muslim women represent a portion of the populace that has been disproportionately persecuted within the United States.¹² Outside of the United States, in countries such as Afghanistan, Muslim women have been viewed by some as the prime beneficiaries of democratization.¹³

With the introduction of full-body scanners, the United States federal government signaled an increasingly stringent approach to security in air travel. However, the government has not fully considered the implications of the scanners regarding Muslim women. Agencies within the United States, such as the Transportation Security Agency (TSA), have yet to take a proactive role in constructing a method of conducting security checks that accommodates the Islamic faith.

5. See Esther Ben-David, *Europe's Shifting Immigration Dynamic*, 16 MIDDLE EAST Q. 2, 15–24 (Spring 2009), available at <http://www.meforum.org/2107/europe-shifting-immigration-dynamic>.

6. Ali, *supra* note 4.

7. U.S. CONST. amend. I.

8. *Id.*

9. See *id.*

10. Many individuals who are not Muslim but have darker skin, such as Middle Easterners, Arabs, and South Asians, are thought to be Muslim out of ignorance. David Morgan, *U.S. Muslims Face Rising Discrimination: Official*, REUTERS (Mar. 29, 2011), <http://www.reuters.com/article/2011/03/29/us-usa-muslims-idUSTRE72S4K720110329>.

11. *Id.*

12. *Id.*

13. *On the Record with Greta Van Susteren: For George W. Bush, Empowering Women in Afghanistan Lays a 'Foundation for a Lasting Peace'* (Fox News television broadcast Mar. 31, 2011) available at <http://www.foxnews.com/on-air/on-the-record/transcript/george-w-bush-empowering-women-afghanistan-lays-039foundation-lasting-peace039>; *On the Record with Greta Van Susteren: Former First Lady Laura Bush Continues to Fight for Afghan Women's Rights* (Fox News television broadcast Mar. 31, 2011) available at <http://www.foxnews.com/on-air/on-the-record/transcript/former-first-lady-laura-bush-continues-fight-afghan-women039s-rights>.

This Note begins in Section II by addressing the impact of full-body scanners on Muslim women by first identifying passages in the Qur'an that require women's modesty in public, thereby giving rise to a privacy interest under the First Amendment. Next, Section III provides a basic explanation of the function and use of full-body scanners. Section IV describes the First Amendment's protection of religious beliefs, and, by proxy, the privacy interests that arise from them in the face of government regulation.¹⁴ Finally, Section V analyzes how the First Amendment's protection of some Muslim women's beliefs interacts with airport security measures, particularly full-body scanners. This analysis provides a better understanding of how full-body scanners fail to promote security and religious freedom and how their use affects Muslim women.

II. RELIGIOUS MODESTY AND PRIVACY

To understand how the use of full-body scanners threatens the practice of Muslim women's beliefs, it is necessary to look at the source of those beliefs. The Qur'an is the principal text of the Islamic faith, and it is the primary source for identifying those beliefs. Secondary texts from the clerics of various sects establish differing interpretations of the Qur'an.¹⁵ However, the following analysis is meant to demonstrate that the state's interest in using full-body scanners poses a threat to the expression of women's Islamic faith.

A. PREVALENCE OF ISLAM

Surveys in various languages differ on the exact number of Muslims in the United States, possibly due to flaws in the selection and scope of the languages used in such surveys.¹⁶ The 2.5 million Muslims in the United States comprise approximately 0.8% of the U.S. population.¹⁷ It is clear from these figures that while Muslims remain a religious minority, there is

14. This Note does not address the many Fourth Amendment privacy arguments against full-body scanners, as this has been an area of addressed scholarship and litigation. These arguments are extremely important, but this Note focuses solely on Muslim women's interest in protecting their privacy as part of their right to religious exercise arising under the First Amendment.

15. Ayatullah Makarim Shirazi & Ayatullah Ja'far Subhani, *Interpretations of Holy Qur'an Based on Personal Views*, IMAM REZA (A.S.) NETWORK, <http://www.imamreza.net/eng/imamreza.php?id=4122> (last visited Apr. 16, 2011).

16. *Mapping the Global Muslim Population: A Report on the Size and Distribution of the World's Muslim Population*, PEW FORUM ON RELIGION AND PUBLIC LIFE, 25, 35–36 (Oct. 2009), available at <http://pewforum.org/newassets/images/reports/Muslimpopulation/Muslimpopulation.pdf> [hereinafter *Mapping the Global Muslim Population*].

17. *U.S. Religion Landscape Survey: Religious Affiliation: Diverse and Dynamic*, PEW FORUM ON RELIGION AND PUBLIC LIFE, 3, 121 (Feb. 2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf> [hereinafter *US Religion Landscape Survey*]. Both of these surveys were conducted in multiple languages. However, these languages may not have been the languages in which respondents were proficient. The methodology of each study is addressed in their respective appendices.

a sizeable portion of the United States' population that identifies with Islam.

There are approximately 1.57 billion Muslims worldwide.¹⁸ Out of a world population of 6.8 billion individuals, one out of every four human beings is Muslim, with the majority residing in Asia.¹⁹ This makes Islam a religion with a massive following, second only to that of Christianity.²⁰

The practice of Islam varies across the world.²¹ Islam spans the entire globe, covering every inhabited continent.²² There are Arabs, Indians, Indonesians, Chinese, and many other racial, ethnic, and cultural groups that practice Islam according to various traditions.²³ There are two main sects of Islam: Sunni and Shi'a, formed by the successors of the Prophet Muhammad.²⁴ Throughout the world and in the United States, the Sunnis are the majority group.²⁵ In some of these countries, particularly in Iraq where Shi'a Muslims are the majority,²⁶ Sunni and Shi'a relations are strained, contributing to civil strife.²⁷ However, in countries like the United States, Sunni and Shi'a Muslims often identify more uniformly.²⁸

Looking further into the demographics based upon sex becomes difficult because there are few sources that contain precise information. It would be extremely presumptuous to assume that all Muslim women wear the full-body *burqa*,²⁹ or even a *hijab* that only covers the head.³⁰ However, the specific type of outer garments worn by a Muslim woman is not so important as is the unifying concept that these garments are an expression of the woman's faith.

18. *US Religion Landscape Survey*, *supra* note 17, at 1.

19. *Id.*

20. C.I.A., *Field Listings :: Religion*, in THE WORLD FACTBOOK (2009), available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html>.

21. Jeri Altenu Sechzer, "Islam and Women: Where Tradition Meets Modernity": *History and Interpretations of Islamic Women's Status*, 51 SEX ROLES 263 (2004).

22. *US Religion Landscape Survey*, *supra* note 17, at 1.

23. Sechzer, *supra* note 21, at 264.

24. *Id.*

25. *Id.*

26. *Id.*

27. Vali R. Nasr, *Sunni vs. Shi'a: Religious Rivalry in Iraq and Beyond*, COUNCIL ON FOREIGN RELATIONS (Nov. 3, 2005), available at <http://www.cfr.org/iran/sunni-vs-shi-religious-rivalry-iraq-beyond-rush-transcript-federal-news-service-inc/p9164>.

28. Sechzer, *supra* note 21, at 264.

29. A *burqa* usually refers to a traditional full-body outer garment worn in public by Muslim women to hide their figures and faces. See Aliah F. Azmeh, *Western Representations of Muslim Women*, 7 J. OF UNDERGRADUATE RES. 25 (2005), available at http://www.oakland.edu/upload/docs/CAS/MOM_Journal_7.pdf.

30. *Hijab* usually refers to both the traditional head scarf worn by Muslim women or the style of dress used to conceal the female figure. For the purpose of this Note, references to *hijab* will refer to the head scarf. See Ibrahim B. Syed, *Women in Islam: Hijab*, ISLAM FOR TODAY (2001), <http://www.islamfortoday.com/syed01.htm>.

B. THE QUR'AN AND MODESTY

While the Qur'an³¹ indicates that "God does not separate spiritual worth into classifications of gender,"³² the rules of modesty do not apply in a similarly equal fashion.³³ For men, the Qur'an simply calls for "believing men to lower their gaze and be modest."³⁴ For women, the Qur'an prescribes the following:

And tell the believing women to lower their gaze and be modest, and to display of their adornment only that which is apparent, and to draw their veils over their bosoms, and not to reveal their adornment save to their own husbands or fathers or husbands' fathers, or their sons or their husbands' sons, or their brothers or their brothers' sons or sisters' sons, or their women, or their slaves, or male attendants who lack vigour, or children who know naught of women's nakedness. And let them not stamp their feet so as to reveal what they hide of their adornment. And turn unto Allah together, O believers, in order that ye may succeed.³⁵

Thus, Muslim women are ordered to cover up and hide themselves from public view, but not in the presence of their *mahrem*—relatives and members of their own household.³⁶ Part of this passage has been interpreted to understand that a woman's face and hands do not need to be covered.³⁷ Additionally, the Qur'an calls upon women "to draw their cloaks close round them [when they go abroad]."³⁸ This establishes a separation between how a Muslim woman presents herself in the public and private spheres. This delineation creates a strong, clearly articulated privacy interest in expressing religious beliefs by adhering to modesty

31. MUHAMMAD MARMADUKE PICKTHALL, *THE MEANING OF THE GLORIOUS QUR'AN* 3:195, 4:124, 16:97, 33:35, 40:40 (1930), available at <http://al-quran.info>. There are many different translations of the Qur'an, and most translators agree that the Qur'an cannot be translated accurately into another language. What translations do exist are in the form of elucidating texts. See Khaleel Mohammed, *Assessing English Translations of the Qur'an*, 11 MIDDLE EAST Q. 58 (Spring 2005), available at <http://www.meforum.org/717/assessing-english-translations-of-the-quran>. This Note uses Pickthall's translation. Additionally, the Qur'an is not open to personal interpretation. This unifies many of the arguments presented here as applying to many Muslims, rather than an individual's unique beliefs. See Shirazi & Subhani, *supra* note 15.

32. Aisha Wood Boulandouar, *The Notion of Modesty in Muslim Women's Clothing: An Islamic Point of View*, 8 New Zealand Journal of Asian Studies 135, 145–146 (2006), available at <http://www.nzasia.org.nz/downloads/NZJAS-Dec06/9Boulanouar2b.pdf>.

33. Sechzer, *supra* note 21, at 268.

34. PICKTHALL, *supra* note 31, at 24:30.

35. *Id.* at 24:31.

36. Boulandouar, *supra* note 32, at 135; Shaykh Gibri F Haddad, *The Veil In Islam*, SUNNIPATH (Oct. 5, 2005), http://qa.sunnipath.com/issue_view.asp?HD=7&ID=514&CATE=2.

37. *Id.*

38. PICKTHALL, *supra* note 31, at 33:59; see also Haddad, *supra* note 36; see also Boulandouar, *supra* note 32, at 142.

requirements. This expectation of privacy applies only to a woman's body in public areas.

III. THE USE OF FULL-BODY SCANNERS

Full-body scanners have been implemented in many airports across the United States in response to increased concern regarding the safety of air travel.³⁹ To understand the impact of the scanners and the events prompting their implementation, a breakdown of the various technologies used and the privacy concerns generated by their use must be addressed.

A. TERRORISM'S EFFECT ON AIR TRAVEL

Since the attacks of September 11, 2001, airport and flight security has changed drastically. Passengers are severely restricted in what they may bring aboard, including being prohibited from carrying a variety of basic toiletry items unless they fit within a one-quart clear, resealable bag.⁴⁰ As they line up to go through security checkpoints, passengers remove their shoes, belts, and jackets. With stringent security procedures, many passengers experience delays and missed flights, prompting questions about and annoyance at many regulations.⁴¹

Flight 253 reminded passengers of why they accept these procedures, even though they may not be effective. On December 25, 2009, Umar Farouk Abdulmutallab boarded Flight 253 from Amsterdam, headed for Detroit, Michigan.⁴² While the flight was in the air, Abdulmutallab attempted to use a chemical syringe to detonate an explosive device he had

39. See Noah Shachtman, *Underwear Bomber Renews Call for 'Naked Scanners'*, WIRED (Dec. 28, 2009), <http://www.wired.com/dangerroom/2009/12/underwear-bomber-renews-calls-for-naked-scanners/>.

40. *For Travelers*, TSA, <http://www.tsa.gov/travelers/index.shtm> (last visited Apr. 1, 2011).

41. See Christina Hall, *Worries Turn Into Long Lines at Detroit Airport*, DETROIT FREE PRESS (Dec. 26, 2009), <http://www.freep.com/article/20091227/NEWS05/912270419/>; Scott Powers, *Airport Experiences: Long Security Lines, Body Searches Here to Stay*, ORLANDO SENTINEL (Nov. 4, 2010), http://blogs.orlandosentinel.com/business_tourism_aviation/2010/11/airport-experiences-long-security-lines-body-searches-here-to-stay.html; Jennifer Sullivan & Joe Mullin, *Long Lines, Missed Flights at Sea-Tac Airport*, SEATTLE TIMES, (Aug. 10, 2006), http://seattletimes.nwsource.com/html/localnews/2003189210_webseatac10.html; Jodie Tweed, *Long Lines at LaGuardia Airport in New York Tipped Clough of Trouble*, BRAINERD DISPATCH (Aug. 11, 2006), http://brainerddispatch.com/stories/081106/new_20060811014.shtml; Scott Wyman, *Long Lines, Few Choices Frustrate Fliers at Fort Lauderdale Airport*, SUN SENTINEL (Apr. 25, 2010), http://articles.sun-sentinel.com/2010-04-25/business/fl-coffee-airport-concessions-20100425_1_airport-concession-contracts-airport-security-medium-sized-airports.

42. *White House Review Summary Regarding 12/25/2009 Attempted Terrorist Attack*, THE WHITE HOUSE (Jan. 7, 2010), <http://www.whitehouse.gov/the-press-office/white-house-review-summary-regarding-12252009-attempted-terrorist-attack>.

planted in his underwear⁴³ The other passengers on the plane saw his attempt and subdued him before he was able to detonate the device.⁴⁴

To address the security failures that led to the attempted bombing of Flight 253, the TSA proliferated the use of full-body scanners.⁴⁵ The TSA has done so in the belief that such incidents such as Flight 253 can be prevented by increasing the invasiveness of searches at airport checkpoints.⁴⁶

B. FULL-BODY SCANNING TECHNOLOGY

Currently, there are two types of scanners in wide use: millimeter wave scanners and backscatter scanners.⁴⁷ Millimeter wave scanners use a low-energy radio wave.⁴⁸ The radio wave can pass through a variety of things, including clothing.⁴⁹ However, the wavelength is not small enough to go through human skin.⁵⁰ The machine then measures the radiated energy from the radio waves bouncing off the skin to create a three-dimensional image of the passenger's body.⁵¹ The measurements are then used to create a viewable image of objects on the body between the scanner and the human skin.⁵² The millimeter wave scanner produces somewhat blurry images, but objects on a person are fairly distinguishable.⁵³ In contrast, a backscatter scanner uses weak X-rays to generate an image.⁵⁴ The X-rays from the machine are absorbed or reflected by different materials, providing an image of everything against the skin.⁵⁵

Recently, the TSA began testing a millimeter wave scanner that does not provide an image of each passenger in a limited number of airports.⁵⁶ Instead of an image of the passenger's actual body, a generic outline of the passenger is displayed on the screen, with areas where objects may be located highlighted on the image.⁵⁷ The viability of this specific type of millimeter wave scanner has yet to be determined. Because organic

43. Nick Bunkley & Liz Robbins, *Nigerian Arraigned in Bomb Attempt*, N.Y. TIMES (Jan. 8, 2010), <http://www.nytimes.com/2010/01/09/us/09detroit.html>.

44. *Id.*

45. *Id.*

46. See Shachtman, *supra* note 39.

47. *Airport Passenger Screening Technologies*, Australian Radiation Protection and Nuclear Safety Agency (Dec. 15, 2010), http://www.arpansa.gov.au/radiationprotection/factsheets/is_AirportScreening.cfm.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. See Shachtman, *supra* note 39.

54. *Id.*

55. *Id.*

56. *How It Works*, TSA, http://www.tsa.gov/approach/tech/ait/how_it_works.shtm (last visited on Apr. 1, 2011).

57. *Id.*

materials tend to reflect X-ray photons, the backscatter machines are able to generate a much higher resolution image compared to the millimeter wave machines.⁵⁸ The resulting image is extremely detailed, demonstrating precise outlines of objects.⁵⁹ Overall, the images are much better than those of millimeter wave scanners.⁶⁰

Full-body scanners have been deployed in over seventy airports across the United States.⁶¹ The use of these scanners is currently optional for all passengers, with the alternative being a pat-down search.⁶² However, the TSA's policies can change at any time and are often not enforced uniformly.⁶³ For the purpose of this Note, the possibility of a mandatory or coerced full-body scan is considered. While such a mandatory or coerced full-body scan is currently not permissible under the policies and procedures of the TSA, it is possible for violations of these policies and procedures to occur under the actual practices of the TSA.⁶⁴

C. PRIVACY CONCERNS

According to the TSA, the images created by these scanners are viewed by a remote TSA agent that cannot see the person being scanned.⁶⁵ Additionally, the agent taking the passenger through the scanning process does not see the image.⁶⁶ The TSA states that the millimeter wave scanner blurs the face of the person and that the backscatter image has a blurring algorithm implemented.⁶⁷ All of these features exist to protect the privacy of the person.⁶⁸

Despite TSA's claims that the scanners "cannot store, print, transmit or save the image," documents obtained through the Freedom of Information Act have revealed otherwise.⁶⁹ The images from these devices can in fact

58. Shachtman, *supra* note 39.

59. *Id.*

60. *Id.*; *Airport X-ray Labeled Strip Search*, SYDNEY MORNING HERALD (Dec. 5, 2006), <http://www.smh.com.au/articles/2006/12/05/1165080915144.html> (referencing the backscatter scanner image).

61. *Advanced Imaging Technology (AIT)*, TSA, <http://www.tsa.gov/approach/tech/ait/index.shtm> (last visited on Apr. 1, 2011).

62. *Pat-downs*, TSA, http://www.tsa.gov/travelers/pat_downs.shtm (last visited Apr. 1, 2011).

63. *Criticism Mounts over New Pat-Downs, Scans*, CHICAGO TRIBUNE (Nov. 18, 2011), http://articles.chicagotribune.com/2010-11-18/news/ct-met-inconsistent-enforcement-1119-20101118_1_pat-downs-security-officer-new-screening-methods.

64. Around early September of 2010, a pregnant woman was allegedly forced into going through a full-body scanner, despite her requests for a pat-down. *Pregnant Traveler: TSA Screeners Bullied Me Into Full-Body Scan*, CONSUMERIST (Sep. 9, 2010), <http://consumerist.com/2010/09/pregnant-traveler-tsa-screeners-bullied-me-into-full-body-scan.html>.

65. *Frequently Asked Questions*, TSA, <http://www.tsa.gov/approach/tech/ait/faqs.shtm>.

66. *Id.*; Shachtman, *supra* note 39.

67. *Privacy*, TSA, <http://www.tsa.gov/approach/tech/ait/privacy.shtm> (last visited Apr. 1, 2011).

68. See *Frequently Asked Questions*, *supra* note 65; Shachtman, *supra* note 39.

69. *UPDATE—EPIC Posts TSA Documents on Body Scanners*, ELECTRONIC PRIVACY INFORMATION CENTER (Jan. 11, 2010), <http://epic.org/2010/01/update---epic-posts-tsa-docume.html>.

be stored.⁷⁰ The TSA explicitly required vendors to implement such features that allow the recording and saving of images.⁷¹ While officials claim that these features are disabled upon deployment of a scanner, the TSA has not disclosed the specifics of this process.⁷²

IV. THE FIRST AMENDMENT'S PROTECTION OF RELIGIOUS EXERCISE

The United States has an articulable interest in using scanning technology to detect threats to public safety, but there are constitutional limits to the state's use of such technology. In addition to the Fourth Amendment interest in protecting personal privacy, Muslim women have an added First Amendment argument that such technology interferes with religious expression protected by the Free Exercise Clause.

A. THE FREE EXERCISE CLAUSE

The freedom of an individual to practice the religion of his or her choice is enshrined in the Free Exercise Clause of the First Amendment, which states that "Congress shall make no law . . . prohibiting the free exercise [of religion]."⁷³ The Supreme Court has held that "[t]he Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority."⁷⁴ To find a violation of the Free Exercise Clause, the Court requires a showing of coercion by a state actor against an individual's ability to freely practice the religion of his or her choice.⁷⁵

The Free Exercise Clause protects "[o]nly beliefs rooted in religion."⁷⁶ The Court explained in *Thomas v. Review Board of the Indiana Employment Sector Division*:

Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion. The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or

70. Kim Zetter, *Airport Scanners Can Store, Transmit Images*, WIRED (Jan. 11, 2010), <http://www.wired.com/threatlevel/2010/01/airport-scanners/>.

71. *Id.*

72. *Id.*

73. U.S. CONST. amend. I.

74. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 222–23 (1963).

75. *Id.*

76. *Thomas v. Review Bd. of the Ind. Emp't Sector Div.*, 450 U.S. 707, 713 (1981).

comprehensible to others in order to merit First Amendment protection.⁷⁷

This interpretation of the Free Exercise Clause guarantees that protection is afforded not only to the realm of accepted or conventional beliefs, but also to any belief rooted in religion. While this may seem like an absurdly wide breadth of protection, the Court refined its explanation of applying the protection into what amounts to a two-factor test of a factual inquiry.⁷⁸ First, a party claiming Free Exercise Clause protection must establish that the belief is a religious one.⁷⁹ Second, the belief must be a truly held religious belief; it cannot be a purely personal standpoint.⁸⁰ This test limited the expansive ground given to the Free Exercise Clause in *Thomas*, shifting away from a wide definition of religious belief.

B. FEDERAL STRICT SCRUTINY ANALYSIS

The Supreme Court established a strict scrutiny standard⁸¹ for claims brought under the Free Exercise Clause.⁸² The Court established this standard in *Sherbert v. Verner* in 1963, stating:

If, therefore, the decision . . . is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate"⁸³

This decision clarified the state's burden in a claim regarding the Free Exercise Clause, requiring the state to demonstrate a compelling interest to justify any burden upon the individual's exercise of religion.

However, in 1990, the Court narrowed its approach to applying the protections of Free Exercise Clause.⁸⁴ In *Employment Division*,

77. *Thomas*, 450 U.S. at 713–714 (citations omitted).

78. *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 833 (1989).

79. *Thomas*, 450 U.S. at 713.

80. *United States v. Seeger*, 380 U.S. 163, 185 (1965). The Eighth Circuit has taken an expansive view of *Seeger*, preventing use of the Free Exercise Clause in claims that are based on personal preferences. *United States v. DeWitt*, 95 F.3d 1374, 1375–76 (8th Cir. 1996).

81. Strict scrutiny requires that when a fundamental right is at issue, a limitation of that right "may be justified only by a 'compelling state interest.'" *Roe v. Wade*, 410 U.S. 113, 155 (1973). Any limitation must be narrowly tailored "to express only the legitimate state interests at stake." *Id.*

82. Neha Singh Gohil & Dawinder S. Sidhu, *The Sikh Turban: Post-911 Challenges to this Article of Faith*, 9.2 RUTGERS J. LAW & RELIG. 54 (2008).

83. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

84. Gohil & Sidhu, *supra* note 82, at 54.

Department of Human Resources of Oregon v. Smith, the Court stated that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”⁸⁵ This meant the state no longer had to demonstrate a compelling interest when defending against Free Exercise Clause claims; however, the Court did not articulate the lesser standard.⁸⁶ Instead, the state simply needed to prove that the law was neutral with respect to religion.⁸⁷ This significantly shifted the advantage away from plaintiffs, favoring a lesser showing by the state, as the state’s burden was lowered to allow an incidental burden upon religious believers.⁸⁸

In response, Congress passed the Religion Freedoms Restoration Act (RFRA) in 1993.⁸⁹ RFRA restored a strict scrutiny standard by mandating “the compelling interest test as set forth in *Sherbert v. Verner* . . .” in cases involving the Free Exercise Clause.⁹⁰ However, in 1997, the Court partially invalidated RFRA as it applied to the states.⁹¹

RFRA still applies to the federal government through powers in Article I of the Constitution.⁹² The Court may have extended the reach of the Free Exercise Clause in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, where it suggested that a “case-by-case consideration of religious exemptions to generally applicable rules” would be feasible.⁹³ In 2006, the Court specifically cited its own prior successful use of such a case-by-case method in *Cutter v. Wilkinson*, but it has not prescribed a return to a strict scrutiny standard.⁹⁴ Nevertheless, the analysis involves a balancing of state and individual interests.

V. MUSLIM WOMEN AND BODY SCANNERS

The intersection of the First Amendment and public safety has yet to be explored fully, particularly in the context of increasing security concerns

85. Emp’t Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

86. Oriana Mazza, Note, *The Right to Wear Headscarves and Other Religious Symbols in French, Turkish, and American Schools: How the Government Draws a Veil on Free Expression of Faith*, 48 J. CATH. LEG. STUD. 333 (2009).

87. *Id.*

88. *Id.*

89. Gohil & Sidhu, *supra* note 82, at 56; Mazza, *supra* note 86, at 334; see 42 U.S.C. § 2000bb (1993).

90. 42 U.S.C. § 2000bb(b) (1993).

91. City of Boerne v. Flores, 521 U.S. 507, 519, 536 (1997).

92. Kikumura v. Hurley, 242 F.3d 950, 959 (10th Cir. 2001) (“Congress’ power to apply RFRA to the federal government comes not from its ability to enforce the Fourteenth Amendment but rather from its Article I powers That the RFRA standard for suits against the federal government is more protective than what the Constitution requires does not make the statute unconstitutional . . .”).

93. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006).

94. *Id.* at 436–37 (citing Cutter v. Wilkinson, 544 U.S. 709 (2005)).

relating to terrorism. The following section explains how a state's interest is balanced against the First Amendment privacy interest of a Muslim woman and concludes that the government should use a better model of airport security to formulate procedures that respect individual rights.

A. PREVIOUS INTERACTIONS OF MUSLIM WOMEN AND AIRPORT SECURITY

One court in the United States has already grappled with the conflict of a Muslim woman's privacy interest in exercising her religious modesty and security measures at airport checkpoints. Samar Kaukab was a twenty-three-year-old United States citizen living in Columbus, Ohio,⁹⁵ and a practicing Muslim of South Asian descent who wore a *hijab* in public in accordance with religious beliefs.⁹⁶ Part of her employment responsibilities required her to engage in nationwide air travel.⁹⁷

On November 7, 2001, Kaukab went to Chicago's O'Hare Airport to fly home to Columbus after travelling for business.⁹⁸ Her attire included "pants, a long sweater, ankle-length boots, and her *hijab*. She carried a purse and small bag."⁹⁹ She also had one suitcase that she checked.¹⁰⁰ After checking her baggage, she joined a line to pass through the security checkpoint with her colleagues.¹⁰¹

While she was in line, other passengers set off the metal detector three times.¹⁰² Each time the detector went off, "the security staff did a quick, relatively unintrusive additional search"¹⁰³ with a wand.¹⁰⁴ After being inspected with the wand, the individuals were allowed to pass through the checkpoint.¹⁰⁵

Kaukab noticed that several individuals who passed through the checkpoint without question wore head coverings, including a woman who wore a scarf.¹⁰⁶ None of these individuals appeared to be of South Asian descent.¹⁰⁷ Additionally, none of them had "clothing that would identify

95. *Kaukab v. Harris*, No. 02 C 0371, slip op. at 5 (N.D. Ill. Aug. 6, 2003). The statements that arise from this case involve a motion to dismiss, so all facts pled are viewed in favor of Kaukab. See generally Abdo Aliah, Note: *The Legal Status of Hijab in the United States: A Look at the Socio-political Influences of the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441 (2008).

96. *Id.* at 5.

97. *Id.*

98. *Id.* at 7.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. A wand is the common term for a hand-held metal detector.

105. *Kaukab*, No. 02 C0371, slip op. at 7.

106. *Id.* at 7-8.

107. *Id.* at 8.

them as of the Muslim faith.”¹⁰⁸ As Kaukab’s items went through the X-ray machine, she “walked through the metal detector without setting it off.”¹⁰⁹ When she walked through, a member of the Illinois National Guard told the security staff at the checkpoint to stop and search her.¹¹⁰

Security staff repeatedly searched Kaukab with a metal detecting wand.¹¹¹ As she was searched, the security staff surrounded her “as if to prevent her from leaving the checkpoint.”¹¹² After the initial search of her person with the wand, the security staff again searched her with a wand, this time including her head.¹¹³ Another security staff member conducted a third search that included the inside of her boots, her “upper body, down her legs and her ‘crotch’ area.”¹¹⁴ The security staff then conducted a pat search, pulling Kaukab’s bra straps and hook.¹¹⁵ They then asked Kaukab to lift her sweater.¹¹⁶ Kaukab complied, and the security staff searched her with a wand over the areas previously covered by her sweater. During this search, the security staff continually used the wand over Kaukab’s head.¹¹⁷ Throughout all the searches, the wand failed to detect any metal.¹¹⁸ People began to form a crowd around Kaukab, causing her embarrassment and humiliation.¹¹⁹

Security staff then “demanded that Kaukab remove her *hijab*.”¹²⁰ Kaukab stated that she could not remove it, citing her religious beliefs.¹²¹ After further demands to remove her *hijab*, she said that she could remove it in a private area, only in front of a woman.¹²² The discussion continued, with security staff demanding that she remove her *hijab* in public and in the presence of men.¹²³ Eventually, Kaukab was taken to a private room.¹²⁴ However, security staff still insisted that she be searched by a man.¹²⁵ Kaukab said that “she would only remove her *hijab* in front of a woman for religious reasons.”¹²⁶ The security staff finally allowed female security

108. *Kaukab*, No. 02 C0371, slip op. at 8.

109. *Id.*

110. *Id.* at 2, 8.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 9.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 9–10.

122. *Id.* at 10.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 10–11.

staff members to search Kaukab, at which point Kaukab removed her *hijab* and consented to a pat search, which proved to be exceedingly invasive.¹²⁷

Kaukab's Free Exercise Clause claims survived a motion to dismiss.¹²⁸ It is the only federal case that specifically addresses Muslim women's First Amendment interests at airport checkpoints. While there are analogous claims, these situations do not independently encompass the security, racial, and gender issues together.¹²⁹ This uniquely places a Muslim women's privacy interest in religious modesty at odds with the state's interest in public safety to evaluate the effectiveness of the Free Exercise Clause.

B. ANALYSIS UNDER THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE

Under *Sherbert* and RFRA, strict scrutiny review applies to analysis of the Free Exercise Clause, requiring the government to provide a compelling interest for its action.¹³⁰ This state interest¹³¹ is balanced against the intrusion upon the individual's ability to freely exercise her or his own religious beliefs.¹³² According to *Frazee*, this implicates a two-step test.¹³³ First, the belief to be protected must be a religious belief.¹³⁴ Second, the belief must be truly held.¹³⁵ A case-by-case basis has been promoted as the appropriate method to undertake this analysis.¹³⁶

1. Traditional Balancing of State Interest and Individual Right

In the case of the mandatory or otherwise coerced use of a full-body scanner at an airport checkpoint,¹³⁷ the state's interest is the safety of airport patrons and staff, airplane passengers and staff, and those who may be harmed by malicious and harmful attacks using airplanes. The potential

127. *Kaukab*, No. 02 C0371, slip op. at 11–13 (Kaukab was searched from head to toe, officials probed private parts of her body underneath her clothing, and repeated parts of the search they had performed before she removed her *hijab*.).

128. *Id.* at 4.

129. Similar cases involve employment cases regarding the wearing of religious articles, such as the *hijab* and the Sikh turban, but they do not take into account both the security issues presented at an airport checkpoint and a religiously based privacy interest that affects display of the body itself. See generally Gohil & Sidhu, *supra* note 82; Mazza, *supra* note 86.

130. 42 U.S.C. § 2000bb(b) (1993); Gohil & Sidhu, *supra* note 82, at 54; *Sherbert*, 374 U.S. at 403.

131. The state expressing this interest is the federal government.

132. *Sherbert*, 374 U.S. at 403.

133. *Frazee*, 489 U.S. at 833.

134. *Thomas*, 450 U.S. at 713.

135. *Seeger*, 380 U.S. at 185.

136. *Gonzales*, 546 U.S. at 436.

137. Analysis of this situation is premised upon a Muslim woman going through a full-body scanner unwillingly. This assumes a mandatory or coercive state action, as full-body scanners are not mandatory according to TSA policies and procedures at this time. *Pat-downs*, TSA, *supra* note 62.

harm is great because airports are busy, crowded ports, and airplanes have large ranges of reach.

The government's interest in protecting against harm increased in the wake of September 11, 2011, after airplanes were used to facilitate several terrorist attacks. The government, including the new Department of Homeland Security (DHS), used a multifaceted approach to beef up security measures. With the security failures of Flight 253, the government began to use full-body scanners to prevent a recurrence. The DHS implemented procedures such as the color-coded Homeland Security Advisory System¹³⁸ and expanded the Federal Air Marshal Service¹³⁹ in airplanes and airports across the United States.¹⁴⁰ This multifaceted approach reveals the difficulty of ensuring that the state's interests are met by using just one of these methods.¹⁴¹

Turning to the individual religious interests, Muslim women have the right to practice their religion through a demonstration of religious modesty. Religious exercise is manifested through covering a woman's body, though there are several variations such as the *hijab* to cover the head or the *burqa* to cover the entire body.¹⁴² The covering also signals that a Muslim woman's response to entering a public sphere is keeping her image private, establishing a clear line between the public and private in a religious context.¹⁴³ This covering up while in the public sphere is an exercise of religion, and a Muslim woman's privacy interest is firmly rooted in her right to practice her religion in public.

When evaluating issues relating to national security and terrorism, a utilitarian framework has sometimes been applied.¹⁴⁴ In an extremely simple utilitarian framework,¹⁴⁵ where rights and interests operate in a zero-sum manner, the rights of the individual succumb to the state's interest in ensuring the safety of many. By looking at the number of people affected

138. *Homeland Security Advisory System*, D.H.S., http://www.dhs.gov/files/programs/Copy_of_press_release_0046.shtm (last visited Mar. 5, 2011).

139. *Federal Air Marshals*, TSA, <http://www.tsa.gov/lawenforcement/programs/fams.shtml> (last visited Jan. 28, 2011).

140. Anna Schechter & Brian Ross, *Obama Orders Air Marshal Surge by Feb. 1: 'Race Against Time'*, ABC NEWS (Jan. 6, 2010), <http://abcnews.go.com/Blotter/air-marshal-surge-race-time/story?id=9493323>.

141. David Kravets, *Airport 'Nude' Body Scanners: Are They Effective?*, WIRED (Mar. 8, 2011) <http://www.wired.com/threatlevel/2011/03/scanners-part3/>.

142. *Id.*

143. Haddad, *supra* note 36; Bouladouar, *supra* note 32, at 142.

144. See Paul Butler, *Foreword: Terrorism and Utilitarianism: Lessons From, and For, Criminal Law*, 92 J. OF CRIM. L. & CRIMINOLOGY 1, 16 (2002); see also generally *Korematsu v. United States*, 232 U.S. 314 (1944). In *Korematsu*, the Court sustained the ability of the executive branch to detain a minority group based on the perception that this group could harm many more individuals. See generally *id.*

145. A utilitarian framework seeks to provide maximum efficiency by finding the point of maximum net benefit. The terms of benefit and cost, as well as the efficiency function itself, can vary greatly.

without weighing the interests themselves, a greater utility can be achieved. When such a framework is applied to the context of terrorism in airports and on airplanes, it seems clear the state's interest should prevail. The interest of public safety is easily compelling, due to the sheer number of those possibly affected.

A better model to use would be a utilitarian framework that incorporates a probability schema that balances the likelihood of harm against the burden on Muslim women's rights. This presents a sub-issue—how would such a schema be determined? It could be based on current statistics involving a variety of factors, such as the numbers of female Muslim terrorists or the approximate casualties arising from a terrorist action involving air travel.

However, the data used in this schema could be useless for clarifying the law. The current information could not account for rapidly changing sociopolitical scenarios. For example, if a war broke out that increased the likelihood of terrorism, how would a previously instituted balancing of interests operate? Such events occur rapidly and frequently in the modern world. Courts should not adhere to only one schema because conditions are likely to change rapidly as technology and political climates constantly change.

2. Tiered State-Interest Analysis

Courts should consider an alternative to a utilitarian framework when looking at the state's interest. A blanket framework that balances a single level of state interest against the right of an individual is inappropriate for considering whether a full-body scanner intrudes upon a Muslim woman's freedom in protecting her body image as an expression of her religion. Rather, the state's interest should be examined in different tiers because the level of encroachment upon the individual's First Amendment privacy right changes depending on state action. As the level of intrusion increases, the state's interest in taking action must be balanced against the individual's right. At each level, the state's policy must be narrowly tailored in accordance with the balance of the state's interest and the individual's right to keep her image private. The level of intrusion changes according to which method the state uses to search passengers, because different searches may reveal more of the individual's body.

At the first level of intrusion, the initial metal detector, the state has an extremely strong interest in scanning individuals for weapons. This type of machine detects metallic objects, such that individuals even need to remove belts with small metal buckles. This is a cursory form of screening that is minimally intrusive and does not require Muslim women to remove any relevant clothing or otherwise sacrifice their religious practice of preserving modesty.

If the metal detector has signaled the presence of metal, the state's interest in determining if the individual is safe increases, and the individual

could be selected for the secondary screening process by using a wand. This method does not intrude on a privacy interest in religious modesty any more than the metal detector. Direct body contact is not necessary, and clothing does not need to be removed. Here, the state's interest is preserved and increased in comparison to the individual's privacy right, as there is a positive result from a metal detector.

At the third level, if the wand also detects metal, a pat-down search can be conducted in private by a female member of the security staff. The state's interest at this level is still high, as the presence of metals that are not readily visible can be detected. Although this is more intrusive than a no-contact wand search, the woman is entering a private area and is in the presence of a woman only. Because Muslim women can be uncovered in the presence of other women, the privacy interest arising from a prescription of a woman's modesty in the Qur'an is less disturbed.¹⁴⁶

The full-body scanner's use would supplant the wand search and obviate the need for a pat-down search. Instead of being scanned with a wand, Muslim women would have to go through the full-body scanner. There are two significant problems with this system. First, the wand sufficiently addresses many of the second tier of security concerns. While there are many other safety threats not detectable by a wand, including chemicals and nonmetallic weapons, there is no indication that a full-body scanner could detect these threats.¹⁴⁷ If a search result was positive or another policy or procedure indicated further search, the third level search could take place.

Second, in the context of the privacy interest based in religious practice, the full-body scanner is far from modest. A look at the images generated from machines demonstrates the extreme detail of which full-body scanners are capable, particularly backscatter scanners, displaying even the genitals of individuals.¹⁴⁸ Because of the level of invasiveness, the First Amendment's privacy right of an individual who practices her religion by an expression of religious modesty is great in comparison to the state's interest in public safety.

The state must consider alternative methods in pursuing its interests such that it narrowly tailors in accordance with the individual's privacy right. When compared to a metal detector or wand, full-body scanners offer an infinitely more invasive search, showing a detailed image of the individual. Generating the image itself is not the problem, assuming the image cannot be saved or printed. However, the viewing of the image does violate modesty. Partially addressing this, the TSA has set up guidelines to

146. Bouladouar, *supra* note 32, at 135.

147. See Grant Stinchfield, *TSA Source: Armed Agent Slips Past DFW Body Scanner*, NBC DALLAS-FORT WORTH (Feb. 21, 2011), <http://www.nbcdfw.com/news/local/TSA-Agent-Slips-Through-DFW-Body-Scanner-With-a-Gun-116497568.html>.

148. *Advanced Imaging Technology*, TSA, *supra* note 61; Schactman, *supra* note 39.

prevent the person viewing the image from viewing the person being scanned.¹⁴⁹ However, even if the image were blurred or anonymous, the person viewing the image is suspect, as it is not known if that person is male or female. In such a situation, only a female viewer would satisfy the requirements of the Qur'an.¹⁵⁰

Outside of these two significant problems with full-body scan images, Islamic religious organizations have stated that full-body scanners violate the teachings of the Qur'an. On February 9, 2010, the Fiqh Council of North America (FCNA) stated that "a general and public use of such scanners is against the teachings of Islam, natural law and all religions and cultures that stand for decency and modesty."¹⁵¹ The following day, on February 10, 2010, the Council on American-Islamic Relations (CAIR) issued a statement supporting the FCNA.¹⁵² Both organizations are well regarded, led by individuals that include scholars and lawyers.¹⁵³ According to the teachings and religious guidance of these organizations, the Qur'an forbids the use of such scanners on Muslim women.¹⁵⁴

Following these arguments, full-body scanners cannot satisfy a strict scrutiny test when evaluated against the right of a Muslim woman to practice her religion. Even if the state has a compelling interest in ensuring airline safety, full-body scanners are not a narrowly tailored means for searching a Muslim woman because there are equally effective ways of searching her without asking her to reveal herself to someone outside of her *mahrem*. A mandatory or coercive full-body scan of a practicing Muslim woman who objects to a scan on religious grounds should be found to violate her First Amendment rights. Therefore, the TSA must continue to ensure that an alternative to full-body scanners is always possible in the cases where the First Amendment may be violated.

C. PROFILING MUSLIM WOMEN

The increased use of body scanners across the nation will undoubtedly result in an increased number of individuals being scanned, even if scanning is not mandatory under the TSA's policy. While this process is

149. *Privacy*, TSA, *supra* note 67.

150. Boulandouar, *supra* note 32, at 135.

151. Fiqh Council of North America, *The statement of the FCNA on the use of full-body scanners for security at the airports and other places* (Feb. 9, 2010), <http://www.fiqhcouncil.org/node/4> [hereinafter *Statement of the FCNA*]. This statement is more expansive than the scope of this Note, establishing that full-body scanners violate the modesty of all Muslims, not just Muslim women.

152. CAIR Supports U.S. Muslim Religious Council Statement on Body Scanners, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (Feb. 11, 2010), <http://www.cair.com/ArticleDetails.aspx?midl=777&&ArticleID=26242&&name=n&&currPage=1>.

153. See Fiqh Council of North America, *History of the Fiqh Council* (2010), <http://www.fiqhcouncil.org/node/6>; see Council of American-Islamic Relations, *CAIR National Board and Staff* (2010), <http://www.cair.com/AboutUs/CAIRNationalBoardandStaff.aspx>.

154. *Statement of the FCNA*, *supra* note 151.

optional at the moment,¹⁵⁵ the TSA faces many internal problems that may prevent uniform application of its policies and procedures.¹⁵⁶ The ad hoc decision making by TSA officers increases the likelihood of encroachment on individuals First Amendment right to privacy.

Additionally, the TSA has demonstrated other failures to respect human dignity. On March 19, 2009, TSA officials required a four-year-old disabled child to remove his leg braces, which he needed in order to walk, and walk through a metal detector.¹⁵⁷ Even after his father, a local police officer, demanded to see a supervisor, the child was forced to walk through the metal detector without his leg braces.¹⁵⁸ A TSA official later stated that the boy should not have been required to remove his leg braces.¹⁵⁹ On its blog, the TSA stated that if a similar situation were to occur, a supervisor should be contacted.¹⁶⁰ It failed to observe that a supervisor was contacted in the March 19 incident, which did not rectify the immediate problem.¹⁶¹

Another case of the TSA's incompetence took place on January 5, 2010.¹⁶² A TSA officer claimed to find a small plastic bag, full of a white substance, in the bag of a Caucasian female college student returning to school.¹⁶³ The student was shocked and began to cry in fear of the consequences of drugs in her belongings.¹⁶⁴ After asking her to tell the truth, the TSA officer told her he was just kidding, having lied about finding the bag of white substance.¹⁶⁵ While the TSA later fired the employee, it shows that even in today's tense atmosphere of airport security, the TSA's personnel do not apply procedure uniformly or correctly.¹⁶⁶

If a four-year-old child and a female college student are forced to undergo degrading, abusive, and inane screening, a Muslim female wearing traditional garments, like the *hijab* or the *burqa* that some view as the unwanted burdens of an oppressive regime, could easily face a similar

155. *Advanced Imaging Technology*, TSA, *supra* note 61.

156. A recent TSA Organization Assessment Survey has revealed that the TSA's employees generally disagree with the effectiveness of the organization's operation. See *Survey of Airport Screeners Shows Problems at TSA*, PROJECT ON GOVERNMENT OVERSIGHT (Jan 20, 2006), http://pogoblog.typepad.com/pogo/2006/01/survey_of_airpo.html.

157. Daniel Rubin, *Another Case of TSA Overkill*, PHILA. INQUIRER (Feb. 15, 2010), http://www.philly.com/philly/news/20100215_Daniel_Rubin__Another_case_of_TSA_overkill.html.

158. *Id.*

159. *Id.*

160. *Four Year Old Boy in Philly Told to Remove Leg Braces*, TSA (Feb. 22, 2010), <http://www.tsa.gov/blog/2010/02/four-year-old-boy-in-philly-told-to.html>.

161. Daniel Rubin, *It Was No Joke at Security Gate*, PHILA. INQUIRER (Jan. 21, 2010), <http://www.philly.com/philly/news/year-in-review/82230762.html>.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

situation. Many Americans have been uneasy, at the very least, with Islamic culture in the United States since September 11, 2001.¹⁶⁷ It seems easy to imagine that a member of a religion that has been blamed for global terrorism and the events of September 11 could be singled out for different treatment is likely. Coupled with the fact that certain minority women are already disproportionately screened at airports,¹⁶⁸ Muslim women are likely to be disproportionately subject to screening by full-body scanners in violation of their First Amendment right that protect their body image outside the private sphere. Moreover, Muslim women may be mandated or coerced to go through full-body scanners. The policy of using full-body scanners at airport checkpoints creates the possibility of a violation of the Free Exercise Clause.

D. REFUSAL OF FULL-BODY SCANS IN THE UNITED KINGDOM

On February 19, 2010, two Muslim women headed for Islamabad, Pakistan, from Manchester Airport were supposedly selected at random to undergo a full-body scan.¹⁶⁹ The women refused to be scanned, one on religious grounds.¹⁷⁰ They became the first passengers to refuse a full-body scan.¹⁷¹ The women were not allowed to board the plane because of their refusal, and they left the airport, forfeiting their tickets.¹⁷²

While such a case has not yet occurred within the United States, it demonstrates that the issue of refusing a full-body scan on religious grounds is a realistic issue that can be expected to occur in the future. Additionally, this affects Muslim women who would have to travel through an airport requiring a full-body scan at any point during their trip. A Muslim woman traveling from the United States to England may have to cancel her trip, as she would have to be scanned on her return flight. This would force her to travel by land or water to the nearest airport that would not require forms of searches that compromise her religious practice. If the United States were to ever enforce such a mandatory or coercive screening process, it would particularly curtail the ability of Muslim women to travel freely.

167. *Islamophobia*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS, <http://www.cair.com/Issues/Islamophobia/Islamophobia.aspx> (last visited Mar. 5, 2011).

168. Sherri Sharma, *Beyond "Driving While Black" and "Flying While Brown": Using Intersectionality to Uncover the Gendered Aspect of Racial Profiling*, 12 COLUM. J. GENDER & L. 283 (2003).

169. *Women Refuse to Go Through Airport Body Scanners*, BBC NEWS (Mar. 3, 2010), http://news.bbc.co.uk/2/hi/uk_news/england/manchester/8547416.stm.

170. Daily Mail Reporter, *Muslim Women Who Refused to Take 'Naked' Full-Body Scan are barred from Manchester to Pakistan flight*, MAIL ONLINE (Mar. 3, 2010), <http://www.dailymail.co.uk/news/article-1255104/Muslim-women-barred-flight-refusing-naked-body-scan.html>. Strangely, the name of the full-body scanner in Manchester is "Rapiscan," a very poorly chosen name that accurately comments on the effect it has upon the dignity of the passengers it is used upon. *Id.*

171. *Id.*

172. *Id.*

VI. CONCLUSION

Many Muslim women have a religious faith that they articulate both philosophically and physically. The physical manifestation of their deeply held faith arises in the form of the clothing they wear in accordance with the teachings of the Qur'an. These beliefs should not only be viewed as oppressive constraints. Instead, it is proper to view these garments as a personal choice of religious expression and fulfillment of religion beliefs.

Such religious expression is strongly protected by the First Amendment's Free Exercise Clause. This codification of a fundamental right is at the foundation of the United States, which was pioneered on the freedom of expression, particularly religious expression. As such, violations and incursions upon this right must be addressed with the utmost diligence by all branches of government.

The state has responsibilities, such as providing airport security, that sometimes encroach on individual liberties. In the case of full-body scans at airports, the state's attempt to protect individuals from harm is characterized as one of greater importance than the rights of a single individual. However, this belief is antithetical to the structure of the Constitution's amendments, which clearly identify individual, expressive rights as key to the formation of the United States of America.

When the state's interest in security through the use of full-body scans intersects with the right of Muslim women to freely exercise their religion, the religious beliefs of these women should supersede the state's interest. Full-body scans may be convenient for airport security and many travelers, but their uniform implementation places Muslim women in situations that pit the state against their religious beliefs. In such cases, these religious beliefs can be maintained while simultaneously achieving the state's interest in security through a tiered approach to conducting searches.

Abusing the use of full-body scanners, or future similar technologies, poses a clear attack upon individual dignity and religious practice. Alternative methods should be available to travelers who have unique physical or religious requirements. Security should never come at the cost of liberty, be it religious or otherwise. As Benjamin Franklin once stated, "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."¹⁷³

It is strange that in the name of security, Muslim women, who are identified as the prime beneficiaries of the actions of the United States abroad, should face a threat to their own liberty within the United States. In November of 2001, Laura Bush cited the oppression of Afghan women by "terrorists and the Taliban," promoting the intervention of the United

173. 6 BENJAMIN FRANKLIN, *Pennsylvania Assembly: Reply to the Governor, November 11, 1755*, in PAPERS OF BENJAMIN FRANKLIN 242 (Leonard W. Labaree ed., 1963).

States to remedy the situation.¹⁷⁴ Just over eight years later, the United States has started its own oppression of Muslim women by restricting their ability to travel through invasive security measures that utilize full-body scanners.

174. *Laura Bush on Taliban Oppression of Women*, WASH. POST (Nov. 17, 2001), available at http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/laurabushtext_111701.html.